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## **Property Law Reforms in Queensland - Is the regulatory burden on land transactions reduced?**

**Sharon Christensen**

*The reduction of unnecessary regulation was a clear policy objective of the Queensland government during 2014. In the area of property sales significant reforms were introduced from 1 December 2014. This article examines the key aspects of these reforms and whether there has been a reduction in red tape for sellers and buyers of land.*

During 2014 the Queensland government passed a number of amendments to legislation aimed at reducing the complexity of the regulatory framework governing land transactions. One of the main objectives of the government was to remove unnecessary 'red tape' to reduce costs for buyers and sellers. This is evident in the significant amendments to the *Land Sales Act 1984*, *Body Corporate and Community Management Act 1997*, and *Property Law Act 1974* in the context of off the plan sales and the new *Property Occupations Act 2014* which has significantly streamlined the process for the sale of residential land.

This article examines these reforms from 2014 and explains their significance for the sale of land process and the responsibilities of land owners and their lawyers.

### **1. Land Sales Act 1984 – Sale of Land prior to registration**

Prior to the amendments in 2014 the *Land Sales Act 1984* regulated "off the plan" sales of land and community title lots in Queensland in conjunction with several provisions in the *Body Corporate and Community Management Act 1997*. The most significant structural change to the legislation is that after 1 December 2014 the *Land Sales Act 1984* only regulates the sale of land off the plan. The sale of community title lots off the plan will be regulated exclusively by the *Body Corporate and Community Management Act 1997* (BCCMA) and the *Building Units and Group Titles Act 1980* (BUGTA). This reduced duplication and inconsistency in provisions between the Acts.

The amendments make significant changes to the process for formation of a contract including disclosure and the obligations of the seller at or prior to settlement where the contract is entered into after 1 December 2014. Contracts entered into prior to 1 December 2014 are subject to the provisions of the Acts prior to the amendments.

#### **a. Removal of prohibition on sale of proposed lots prior to development approval**

The sale of vacant land off the plan is aligned with the sale of CTS by removal of the restriction on entering a contract prior to development approval. However, although a developer is permitted to enter a contract at any time, the constraints imposed by the new disclosure regime and the sunset date of 18 months after contract mean that contracts entered into too early in the development process are at risk of termination.

#### **b. New exemptions**

The previous exemption process has been abolished. Automatic exemption is provided for land subdivided into five lots or less and large transactions (sale of 6 lots or more under the one contract with the same seller and buyer): *Land Sales Act 1984*, s3. Interestingly, no express exemption was included to deal with the Court of Appeal decision in *Special Projects (Qld) Pty Ltd v Simmons* [2012] QCA 205. The court held that a sale of a proposed lot after a resumption of part of the lot was not subject to the *Land Sales Act 1984* on the basis the Act regulated sales by developers. Despite this omission, the decision is likely to continue to apply as the purpose and objects of the *Land Sales Act 1984* where not altered by the amendments.

#### **c. Disclosure statements and plans**

The requirement for a seller to give the buyer a disclosure statement and disclosure plan before the contract is entered into is retained. The amendments make it clear that disclosure is required prior to entry into a contract or an option. If disclosure is given at the time of entry into an option, further disclosure is not required when the option is exercised unless the contract formed is not between the same parties to the option. This may occur in the case of a nomination by the buyer or an exercise in favour of a third party.

The amendments introduce the following changes to disclosure plans:

- i. The prescribed requirements for the plans have been aligned with current surveying practice and should include contour levels, the area of the lot, dimensions and orientation to north, as well as new requirements for depth of fill and compaction rates and the location and height of retaining walls (if there are operational works for the lot).
- ii. The disclosure statement has been simplified and the requirement to give copies of development approvals to the buyer no longer apply. The disclosure statement is only required to be signed by the seller (not the buyer) and similar to the BCCMA must be substantially complete.

As at present, if the survey plan has been sealed by Council, it is sufficient to give a copy of this to the buyer instead of the disclosure plan and statement.

#### **d. Variations to disclosure plans**

The amendments have aligned the process for notifying buyers of variations to disclosure plans in both the *Land Sales Act 1984* and the BCCMA. For contracts entered into after 1 December 2014 a seller is required to give notice of changes at least 21 days before settlement. The further statement must be prepared by a cadastral surveyor and include a plain English explanation of the changes.

A buyer will be able to terminate within 21 days of receiving the new disclosure plan if the buyer is materially prejudiced by the changes to the plan. It remains to be seen how the courts will apply this concept to land sales. However, if applied consistently with the meaning attributed to the phrase under the BCCMA (*Mirvac Queensland Pty Ltd v Wilson* [2010] QCA 322), it is likely to include circumstances where the change causes a substantial reduction in the value of the lot or makes it impossible or significantly more expensive for the buyer to construct improvements on the property in the way proposed.

#### **e. Obligations impacting the timing of settlement**

There is no provision in the Land Sales Act requiring a certain period of notice for settlement and the sunset date of 18 months after contract remains the same. However, sellers should ensure that any obligations in relation to further disclosure statement or copies of plans are satisfied in accordance with the new provisions. At least 14 days prior to settlement the seller is required to provide to the buyer:

- i. a copy of the survey plan for the proposed lot which was registered in the Land Registry; and
- ii. a statement prepared by a cadastral surveyor to the effect there are no differences between the information contained in the registered plan and the information in the last disclosure plan given to the buyer.

If there is a difference between the registered plan and the latest disclosure plan given to the buyer the seller will need to first provide a further statement under s 13 LSA prior providing the statement by the cadastral surveyor. A further statement under s 13 LSA must be given at least 21 days prior to settlement. To avoid last minute disputes prior to settlement sellers should be reminded of the obligation in s 13 LSA once the survey plan has been prepared for registration. While a buyer can only terminate for inaccuracies under s 13 if materially prejudiced, the right to terminate for a failure to provide a statement by a surveyor is not subject to this restriction.

#### **f. Bank Guarantees**

New provisions regulating bank guarantees which are given as security for payment of the deposit were introduced to the *Land Sales Act 1984* and BCCMA. An obligation is imposed on the stakeholder to keep the instrument until the stakeholder is required to return it to the buyer at law or when it is called upon in accordance with the contract. Any money received by the stakeholder by calling on the guarantee must be dealt with in the same way as other trust money by paying the proceeds into its trust account.

## **2. Body Corporate and Community Management Act – proposed lots**

As a result of the changes to the *Land Sales Act 1984* a number of amendments were made to the BCCMA to align the disclosure process for a community title scheme (CTS) lot with the process in the *Land Sales Act 1984* and to incorporate the trust account requirements and sunset date provisions previously located in the *Land Sales Act 1984*. The other significant change to the formation process is the abolition of the Warning Statement and Information Sheet by the *Property Occupations Act 2014*.(see below)

#### **a. Disclosure Plan and Statement**

The requirement for a Disclosure Statement is retained, but the statement must now identify the lot (previously a requirement in the LSA, s 21) and state the sunset date. Like the *Land Sales Act 1984*, the amendments make it clear that disclosure is required prior to entry into a contract or an option. If disclosure is given at the time of entry into an option, further disclosure is not required when the option is exercised unless the contract formed is not between the same parties to the option.

The requirement for a disclosure plan was included in the BCCMA for contracts entered into on or after 1 December 2014. The disclosure plan requirements are prescriptive, but essentially require the plan to be prepared by a cadastral surveyor and include the level of detail usually found on a draft survey plan (including lot area). The only significant difference between the requirements for a building, volumetric or standard format plan in a CTS is the requirement for contour levels, compaction rates and location and height of retaining walls to be included for the sale of a standard format lot. In addition, if the seller intends that there be a building a proposed standard format CTS lot, the disclosure plan has to show the location of the building, the total area and number of levels of the building and the features to be constructed on the lot. This means the disclosure requirements for the sale of land in a proposed standard format lot for a CTS lot will be greater than previously required.

#### **b. Proposed CTS lot - variations**

The timing of a further disclosure statement setting out changes to the disclosure plan or statement was changed. For contracts entered into on or after 1 December 2014 a seller is required to give a further statement at least 21 days before settlement. Where there are changes to the proposed lot in the disclosure plan, the further statement will have to be certified as accurate by a cadastral surveyor. The buyer will have the right to terminate the contract if materially prejudiced by the change within 21 days of receiving the further statement. This means that a further disclosure statement must be given prior to giving notice of settlement under s 212 BCCMA.

#### **c. Sunset Dates**

New sunset date provisions were introduced for contracts entered into after 1 December 2014. A seller can now specify in the contract a sunset date up to 5 ½ years from the contract date. The date must also be disclosed in the Disclosure Statement. Sunset dates longer than 5½ years will be deemed to be 5½ years. If no sunset date is specified in the contract, the existing 3½ year sunset date will apply.

A contract that provides for a sunset date with a right for the seller to extend the date due to delays in construction is not recommended. Section 217B requires the contract to 'provide for a date by which it must be settled'. There is a risk that this type of provision does not provide a date for settlement and consequently the 3½ year sunset date will apply. The provision is similar to the *Sale of Land Act 1962* (Vic), s 9AE which requires a contract to specify 'a period' for settlement. In *Harofam Pty Ltd v Scherman* [2013] VSCA 104 contractual provisions that provided a time period which could be extended by the seller were held to be ineffective as a provision that 'specifies a period'.

### **3. Property Law Act 1974 – 20% deposits allowed**

Significant changes were also made to the instalment contract provisions of the *Property Law Act 1974* for off the plan sales.

The definition of deposit in the *Property Law Act 1974* (Qld), s 71 was amended to increase the allowable deposit to 20% for proposed lots under the *Land Sales Act 1984, Building Units and Group*

*Titles Act 1980, Body Corporate and Community Management Act 1997 and the South Bank Corporation Act 1989* before an instalment contract is created.

Deposits are still required to be held in a lawyer's or real estate agent's trust account until settlement. The rationale for the change is to go some way towards reducing the risk for developers and financiers of deposits being inadequate to cover their losses when buyers fail to settle.

A further provision was also inserted into the *Property Law Act 1974*, s 68A which provides that a 20% deposit may be forfeited by the seller if the breach results in termination of the contract. The section expressly declares the deposit is not a penalty in law or equity.

#### **4. *Legal Profession Act 2007 – payment of deposit from trust***

Amendments to the *Legal Profession Act 2007*<sup>1</sup> provide a mechanism to deal with forfeited deposits where there is a dispute between the parties.

The new provisions enable a stakeholder to give the buyer a notice of intention to pay the deposit to the seller (or vice versa) if the buyer does not commence proceedings within a specified period (of at least 60 days). The stakeholder is then entitled to pay the deposit to the nominated party if proceedings are not commenced. This is expected to reduce the instances of buyers with unmeritorious claims frustrating sellers' attempts to forfeit deposits in the hope of negotiating a refund of all or part of the deposit.

A stakeholder who releases the deposit in accordance with the statutory requirements is expressly relieved of liability if a court later concludes the deposit was paid to the wrong party: *Legal Profession Act 2007*, s 262B(5).

#### **5. *Property Occupations Act 2014***

Significant changes to practice were also introduced by the *Property Occupations Act 2014* (POA) on 1 December 2014. Relevant to the sale of land the Act addressed significant concerns raised by the legal profession and other stakeholders about the complexity of complying with the disclosure requirements for residential property and the large number of contractual disputes between buyers and sellers generated by the warning statement and cooling off provisions in the *Property Agents and Motor Dealers Act 2000*.

To address these concerns and aligned with the State government's policy to reduce regulatory red tape, the PAMDA was split into four Acts, *Motor Dealers and Chattel Auctioneers Act 2014*, *Debt Collectors (Field Agents and Collection Agents) Act 2014*, *Agents Financial Administration Act 2014* and the *Property Occupations Act 2014*. This structural change facilitates a legislative framework more responsive to the individual needs and characteristics of the different regulated industry sectors.

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<sup>1</sup> Similar amendments were introduced to the *Agents Financial Administration Act 2014* for real estate agents holding deposits.

The POA introduced significant changes for licencing of real estate agents, property developers and resident letting agents, the deregulation of commission rates, simplifies the appointment process for real estate agents and regulates the provision of price guides, as well as making significant changes to the contract formation process. This article only considers the changes in the POA impacting on the formation of residential contracts.

*a. Simplification of definition of relevant contract*

A relevant contract is a contract for the sale of residential property. The definition of residential property has been simplified: “real property that is used, or is intended to be used, for residential purposes but does not include real property that is used primarily for the purposes of industry, commerce or primary production”. Property that falls within the definition includes land with a residence constructed on it, vacant land on which a residence may be constructed and a residential unit or proposed residential unit.

*b. New exemptions to the concept of a relevant contract*

Section 160 provides for a number of exceptions to the concept of a relevant contract. The listed exemptions include:

- i. a contract formed on a sale by auction (the meaning of this phrase has not changed); or
- ii. a contract entered into, by no later than 5p.m. on the second clear business day after the property was passed in at auction, with a registered bidder for the auction; or
- iii. a contract (a **later contract**) formed because of the exercise of an option granted under an earlier contract, if the parties to the later contract are the same as the parties to the earlier contract; or
- iv. a contract if the buyer is a publicly listed corporation or a subsidiary of a publicly listed corporation; or
- v. contract if the buyer is the State or a statutory body; or
- vi. a contract if the buyer is purchasing at least 3 lots at the same time, whether or not in the 1 contract.

The section clarifies the uncertainty about whether a contract formed upon the exercise of an option is a relevant contract. However, where the contract is entered into with a nominee of the grantee under the option, the contract will be a relevant contract to which the provisions apply.

*c. Abolition of Warning Statement and BCCM Information Sheets*

A relevant contract is no longer required to have a warning statement or BCCM Information Sheet (Form 14) attached to the contract. Instead a relevant contract must contain immediately above where the buyer signs and on the same page a warning as required by s 165(2) of the Act. These required words must be in the contract at the time the seller gives the contract to the buyer and have been included in the standard form of contract. The obligation to attach a BCCM Information sheet to a contract for the sale of non-residential property is also repealed.

A seller who fails to include the contract warning at all or immediately above where the buyer signs the contract is liable to a penalty. The contract may not be terminated.

d. *New process for waiver of cooling off rights*

Waiver or shortening of the cooling off period no longer requires a lawyer's certificate. The buyer is entitled to waive the cooling off period by written notice to the seller. No time period for the giving of notice is prescribed. Notice may therefore be given before or after entry into the contract.

e. *No independent lawyers certificate*

The requirement for an independent solicitor's certificate to be given to the buyer is removed. A lawyer's duty under the common law to disclose conflicts of interest continues under the general law.

f. *Removal of requirement to give a notice where sale of vacant land not for residential purposes*

Currently a real estate agent is required to give a notice under s 149 PAMDA if the land if a residence cannot be constructed on the land. This requirement has been omitted from the Act. A buyer will need to make their own inquiries to ensure a residence can be constructed on the land.

## **Conclusions**

The introduction of the *Property Occupations Act* has certainly reduced the number of forms and related disclosure obligations of sellers of residential property. This has led to a consequent reduction in disputes between buyers and seller about the enforceability of the contract. The amendments to the *Land Sales Act* and BCCMA however retain existing protections for buyers provided by disclosure statements and sunset dates, which from some perspectives is red tape. Even though the amendments impose additional disclosure obligations through disclosure plans and new rules for payments from trust accounts there are benefits to sellers and their legal advisors in a clearer and more efficient approach to the regulation. Duplication and inconsistencies between the *Land Sales Act* and BCCMA are removed, clarity is provided about dealings with deposits and bank guarantees and a 'safe harbour' rule is implemented for the payment of money held in trust. When considered as a whole package the legislative changes have retained a balance between protections for buyers and creating certainty in the law for sellers.